



POLICE DEPARTMENT

September 6, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Catherine Guzman  
Tax Registry No. 914054  
School Safety Division Uniform Task Force  
Disciplinary Case No. 2011-4408

Police Officer Mariana Diaz  
Tax Registry No. 933744  
Police Service Area 7  
Disciplinary Case No. 2011-4410

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The above-named members of the Department appeared before me on April 23, 2012, charged with the following:

Disciplinary Case No. 2011-4408

1. Said Police Officer Catherine Guzman, assigned to PSA #7, while on-duty, in uniform, on or about July 4, 2010, in Bronx County, did fail and neglect to remain alert, to wit: Said Police Officer Catherine Guzman was observed by Chief James McNamara throwing and catching a football with three Uniformed Members of Service known to this Department while maintaining a foot post.

P.G. 203-05, Page 1, Paragraph 2 – PERFORMANCE ON DUTY –  
GENERAL

Disciplinary Case No. 2011-4410

1. Said Police Officer Mariana Diaz, assigned to PSA #7, while on-duty, in uniform, on or about July 4, 2010, in Bronx County, did fail and neglect to remain alert.  
(As amended)

P.G. 203-05, Page 1, Paragraph 2 – PERFORMANCE ON DUTY –  
GENERAL

COURTESY • PROFESSIONALISM • RESPECT

The Department was represented by Javier R. Seymore, Esq., Department Advocate's Office, and Respondent Guzman and Respondent Diaz were represented by Eric Sanders, Esq.

Respondents, through their counsel, entered pleas of Not Guilty to the subject Charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

#### Disciplinary Case No. 2011-4408

Respondent Guzman is found Not Guilty.

#### Disciplinary Case No. 2011-4410

Respondent Diaz is found Not Guilty.

### SUMMARY OF EVIDENCE PRESENTED

#### Introduction

It is not disputed that on Sunday, July 4, 2010, Respondent Diaz and Respondent Guzman were on duty, in uniform, assigned to Police Service Area (PSA) 7, partnered together performing an overtime tour of duty pursuant to the Housing Bureau's Violence Reduction Initiative (Impact Overtime) at the Butler-Webster Housing Development in the Bronx (the Houses) along with Police Officers Gregory Karnow and Daniel Staple, who were also assigned to PSA 7.

The Department's Case

The Department called Deputy Chief James McNamara as its sole witness.

Deputy Chief James McNamara

McNamara, a 31-year member of the Department, is currently assigned as Executive Officer, Patrol Borough Manhattan South. In July, 2010, he held the rank of Inspector and was assigned as Commanding Officer, Housing Borough Bronx-Queens.

On July 4, 2010, he was on duty, in uniform. He drove alone in an unmarked Department vehicle to the Houses in order to monitor the deployment of the officers assigned to posts there and to insure that conditions there were being addressed by these officers, who were performing Impact Overtime tours. When he arrived in the area of the Houses, he parked his car on Webster Avenue and remained seated inside the car. He observed Respondent Diaz, Respondent Guzman, and Police Officers Karnow and Staple standing with civilians. As McNamara sat in his car watching, he saw a lot of movement but he could not make out what was going on until he saw one of the officers throw a football and saw another officer trying to block the throw.

McNamara testified that he became concerned that the four officers were not addressing the conditions within the Houses. He explained that one major condition is violence-related crimes and he noted that between January 1, 2010 and July 4, 2010, there had been five shootings within the Houses. McNamara testified that there was also a thriving narcotics trade at the Houses. McNamara testified that the four officers were performing Impact Overtime pursuant to the Violence Reduction Initiative and that the purpose of this overtime program was to address conditions within the Houses such as

open alcohol use, fireworks, and parties. McNamara testified that the four officers were also supposed to shut down barbecues as it got late into the evening.

McNamara testified that he became upset because he believed that the officers were violating the Patrol Guide. McNamara added that he also had personal reasons for becoming upset with the officers. He had been a police officer during the 1990s when conditions regarding crime were bad. He believed that he and the Department had worked hard to reduce crime rates and he would become upset when he got the feeling that some officers did not care about these past efforts and accomplishments.

McNamara also felt that Respondents Guzman and Diaz had demonstrated a lack of urgency by arriving at the Houses later than Karnow and Staple and he believed that Respondents Guzman and Diaz could have arrived at their post earlier than they did. Although McNamara was aware that Respondents Guzman and Diaz had asserted that they were awaiting transportation to their post, McNamara claimed there were "a lot of cars" available to transport them. McNamara testified that he expected officers to "go out there and find bad guys and look for trouble." He testified that Respondents Guzman and Diaz did not meet his expectations in this regard.

McNamara sat in his car watching the officers for about five to six minutes. McNamara then exited his vehicle and approached the officers. McNamara spoke with them for a couple of minutes. He reasoned that the officers had not been alert because they did not spot him sitting in his car as he watched them toss the football. He believed this showed that the officers were "oblivious" to the conditions around them. McNamara stressed the importance of officers being alert while on duty in housing developments since they can be violent places. McNamara noted that during the time he observed the

officers from inside his car, he never saw them try to break up a party, prevent anyone from drinking, or prevent anyone from using violence.

McNamara testified that Respondents were receiving "time-and-a-half" for working the Impact Overtime at the Houses. He explained that there are only so many such overtime tours "to go around" and that overtime resources should be allotted "to where they are most needed." McNamara stated that because of the violence and narcotics problems at the Houses, officers should establish a police presence to make it known that the police are there. He contended that tossing around a football and standing around outside did not constitute properly addressing conditions at the Houses.

A couple of days later, McNamara recommended that each officer be issued a Command Discipline (CD). He later learned that Respondents Guzman and Diaz had not volunteered for the Impact Overtime tour on July 4, 2010. He also learned that Respondent Guzman had worked a paid detail earlier that day and that July 4, 2010, was a vacation day selection for her. McNamara concluded that these facts indicated that Respondents Guzman and Diaz had not wanted to work on July 4, 2010.

On cross-examination, McNamara agreed that people generally comply with the law when uniformed police officers are present. He also agreed that the Department establishes omnipresence through visible uniformed officers and marked vehicles. He stated that officers assigned to a housing development are on foot for the most part and that they are expected to perform vertical patrols inside buildings and to engage in interactions with residents. He agreed that interacting with the community is taught during police training and is consistent with the Department's policy that officers demonstrate Courtesy, Professionalism and Respect (CPR) towards civilians. He also

acknowledged that one aspect of crime reduction is that officers establish good relations with the members of the community because creating good will can help in generating information about criminal activity within the community. He agreed that commanding officers generally expect their officers to interact with the community.

McNamara reiterated that he expected the officers "to address the conditions" at the Houses. He agreed that officers are granted discretion regarding rule enforcement on holidays. For example, although barbecuing on the grounds is normally prohibited, this rule is relaxed on July 4 and officers will usually allow residents to set up barbecues. McNamara also agreed that officers are expected to be courteous when members of the community approach them and try to talk to them and he acknowledged that it is important for officers to have positive interactions with children.

McNamara agreed that there was no indication that any shootings or any other crimes or any disorderly conduct was taking place at the Houses when he saw Respondents interacting with the residents or when he approached Respondents. McNamara stated that at first he could not tell exactly what was going on while he watched the officers from the car. He had his Department radio on at the time and he did not hear any transmissions requesting police assistance. He acknowledged that none of the community members were arguing with the Respondents.

McNamara conceded that Respondents were appropriately stationed at their assigned post which was the general area of the Houses. He confirmed that part of Respondents' job was to address conditions within their assigned area.

McNamara could not recall what the civilians in the area were doing as he approached Respondents. He stated that he did not see any of the community members

arguing or fighting. He conceded that Respondents were addressing conditions merely by their presence, but only those conditions outside of the building they were standing in front of. He stated that Respondents were standing within part of their post, but he did not know whose specific post it was. He believed the Houses were assigned generally to the officers. He confirmed that although Karnow and Staple arrived at the Houses at about 8:05 p.m., Respondents did not arrive there until 8:30 p.m.

McNamara testified that he saw one of the male officers throw a pass with a football. The other male officer "was jumping in the air trying to block the pass." Respondent Diaz was standing nearby the two male officers. He could not recall what Respondent Guzman was doing. He addressed the two male officers "because they had the football." He believed that they were not alert to the conditions around them, although believed that "the charge was improper patrol." As he approached the officers, either Karnow or Staple asked him, "What's going on Inspector?" The male officer who addressed him sounded surprised to see McNamara. McNamara recalled seeing a member of the community standing with the four officers, but he had no recollection of seeing a child there.

When McNamara was asked what condition Respondents had failed to address and how they had not been alert, he answered that Respondents "were not alert to the conditions" at the Houses, that "they didn't see me there," and that "they weren't focused on what was going on around the development. They weren't interested in sailing the ship into harm's way." McNamara stated that Respondents "were assigned to Butler and Webster Houses" which consisted of a five block area containing 11 buildings, and that "if you have a post that's five blocks long" you are not properly covering that post if

“you stand in one corner.” He agreed that supervisors “sometimes carve it up” into patrol sectors “so the sergeant or lieutenant may have split it.” He did not know whether Respondents had been told that they would be patrolling only some of the buildings within the Houses. He did not examine Respondents’ Activity Logs at the scene to ascertain whether they had made any entries.

On redirect examination, McNamara declared that Respondents were not assigned to throw a football to each other. He explained that posts are assigned differently every night so he did not know what Respondents’ specific post was that night. McNamara stated that the general duties included “surveying the entire development” and to break up any “narcotics trade going on there.” He stated it was abnormal for four officers to be “hanging around together” since housing officers usually patrol in pairs. Eight police officers are assigned in four teams of two in the overtime module. He expected the teams to cover the entire area. McNamara felt that Respondents and Karnow and Staple were not maximizing their resources because they were not covering the entire area of the Houses.

On re-cross examination, McNamara conceded that he did not personally observe any conditions that needed to be addressed under the Violence Reduction Initiative or otherwise.

#### Respondent’s Case

Respondents Diaz and Guzman testified on their own behalf.



Respondent Diaz

Respondent Diaz, an eight-year member of the Department, testified that she learned about the concept of omnipresence at the Police Academy. She was taught that the visible presence of a uniformed officer in an area can deter criminal activity in that area. Respondent Diaz received instruction when she started at PSA 7 to do verticals and to "be very visible to any condition to be addressed." She was also instructed to be courteous to members of the community when they approach her with concerns or questions. Respondent Diaz testified about learning the meaning of partnership between the police and the community during training. She learned to establish a good relationship with the community so that she would know what is happening within the community.

Respondent Diaz has been in the Housing Bureau her entire career. She agreed that working in Housing is unique compared to other assignments in that officers are constantly interacting with the community. She has had negative interactions community residents before and negative interactions have generally made her job more difficult. Positive interactions with the community make her job easier.

Respondent Diaz stated that she was working from 7:30 p.m. to 2:05 a.m. on July 4, 2010. Her supervisor, Sergeant Fanelly, did not assign Respondents to specific buildings within the Houses. Respondent Diaz asserted that Fanelly told them to choose three buildings for their post that night. She testified that four sets of two pairs of police officers were assigned to the Houses. Fanelly dropped Respondents off in front of 1260 Webster. Respondent Diaz recalled that it was a hot evening and there were many people outside. Karnow and Staple were already at the Houses when Respondents got there.

According to Respondent Diaz, there was no violence, drug dealing, drinking, or disorderly conduct when she was dropped off. She saw Karnow and Staple in front of the 1260 Webster building, and they were not engaging with the community at the time. Karnow and Staple were not arresting anybody, nor were they telling anybody to "get out of here" because of drinking, drug dealing, or disorderly conduct. When Fanelly dropped her off, he did not get out of the car to see what Karnow and Staple were doing.

Respondent Diaz asserted that she got to the post at 8:30 p.m. She stated that she and Respondent Guzman approached Karnow and Staple to discuss how to split up the buildings and the parameters of the assignment. Respondent Diaz was unsure of exactly how the football started to get tossed around. She stated that a child of about seven years and his family members walked to the front of the building. The child was holding a football. When the family walked in front of the four officers, the child tossed the football to either Staple or Respondent Guzman. Respondent Diaz thought the child was initially somewhat intimidated by the officers, but became more relaxed after the officers started tossing the ball with the child. The adults, one male and one female, were smiling as the officers were tossing the football with the child.

Respondent Diaz asserted the officers tossed the football for about five minutes. While the officers tossed the ball, people were not shooting, dealing drugs, acting disorderly or acting drunk. There were no barbecues or robberies taking place at the time.

Respondent Diaz first noticed McNamara when he was by the side of the courtyard. She explained that there were three buildings in the courtyard area, and she was standing in front of the middle building with the other two buildings on each side.

The sidewalk was located between the courtyard and the street. Respondent Diaz testified that when McNamara approached the officers, he first addressed Karnow and Staple. Respondent Diaz could not hear what McNamara was saying to the officers, but she could tell that he was upset. The child was right next to McNamara when he came up to address Respondents. Respondent Diaz felt that the members of the community became intimidated when McNamara approached them because the community members walked away.

Respondent Diaz stated that McNamara never directly addressed her and that he did not talk to the male officers for very long. McNamara did not accuse her of committing misconduct. Respondent Diaz first heard about the misconduct charge from her Integrity Control Officer (ICO) a few days later. She was charged with improper patrol and failure to remain alert. She was told that McNamara said he saw her tossing a football. Respondent Diaz claimed she never tossed a football. She did not agree with the "failure to be alert" charge because she understood the charge to mean "sleeping on your post." She felt that based on her training in the Police Academy, her mere presence at her post within the Houses was addressing the conditions that were part of the Impact Overtime. She asserted that when members of the community see a uniformed police officer standing in the area, they are less disposed to engage in illegal conduct.

On cross-examination, Respondent Diaz stated that she has been assigned to PSA 7 for almost eight years. She has addressed several conditions within the housing development during this time. These conditions included drinking, smoking, urinating in public, shootings and stabbings. At the time of the alleged misconduct, none of these conditions were occurring and did not need to be addressed. Respondent Diaz claimed

that she was being active at her post on July 4. She arrived at her post at 8:30 p.m. and performed her first vertical within 1260 Webster at around 9:20 p.m. She explained that she waited 50 minutes between her arrival and her first vertical because Respondents could not get through to Central on their Department radio. During that 50-minute period, she and Respondent Guzman stayed in the area of their post, which included 1260 Webster Avenue.

Respondent Diaz admitted that seeing McNamara upset gave her a sense of urgency to start moving around and perform a vertical. While she maintained that Respondents' inactivity before their interaction with McNamara was not because they did not want to be active or perform verticals, she conceded that the interaction with McNamara raised them to "start getting active." Respondent Diaz agreed that at no point did her supervisor instruct the officers to "stand around and do nothing while your partners throw a football around."

Respondent Diaz believed she and Respondent Guzman were standing at their post and properly patrolling when the officers were throwing around the football with the child. She asserted that there is no specific time when officers are supposed to perform verticals. Respondents were not instructed to do a vertical as soon as they got to post. Respondent argued that she was not just standing there and doing nothing while watching the football get passed around. She claimed that she was actively patrolling the area by standing there and looking around because she could see what was going on in the perimeter of her post.

Respondent Diaz stated that the child was involved in passing the football with the officers the entire time. She did not recall if Respondent Guzman and Staple ever

threw the ball to each other, but remembered each of the officers throwing the ball to the child. Respondent Diaz never attempted to talk to the child or the family. She never suggested to her colleagues that it may be a bad idea to throw a football while they were on an overtime assignment.

Respondent Diaz stated that her understanding of her duties under the Impact Overtime was to take action if she saw something that needed to be addressed. She contended that during the time that the officers were tossing the football, no conditions needed to be addressed. It was a hot day and people were "outside having fun," but no one was misbehaving at the time. Respondent Diaz conceded that at that point she was not actively searching for criminal activity. She claimed that being on her post sufficiently addressed the conditions of her overtime assignment.

On redirect examination, Respondent stated that the fact that she was performing an overtime assignment did not affect how she policed. Upon further questioning, Respondent Diaz confirmed that she was partnered with Respondent Guzman for foot patrol that night. She stated that 1260 Webster Avenue, the building they were standing in front of when McNamara approached them, was one of the buildings that Respondents had chosen to patrol. Respondent Diaz testified that she and Respondent Guzman were assigned Post Number six that night which included all of the Webster Avenue-side buildings.

Respondent Guzman

Respondent Guzman, a 19-year member of the Department, is currently assigned to the School Safety Division. She testified that at the Police Academy she was taught to

engage in positive interactions with the community while on patrol because positive interactions can result in officers obtaining information about criminal activity from community members. The supervisors at her command also instructed her to maintain a positive interaction with the community. Her supervisors instructed her to visit with residents to see if they had concerns or to gather information that could help police officers.

Respondent Guzman was assigned to patrol duties in PSA 8 beginning in 1994. She remained on that assignment for eleven and a half years. She then retired from the Department and came back in January 2006. She was assigned to PSA 7 for five and a half years.

Respondent Guzman stated that on July 4, 2010, she was assigned to the Houses by Fannelly. Respondent Guzman did not recall Fannelly discussing requirements of her post for that day. Fannelly drove Respondents to the post, arriving there at 8:30 p.m. Respondent Guzman testified that when she first arrived to the post, she saw a few people outside. People were playing basketball and some people were sitting on a bench. There were no barbecues occurring. Respondent described 1260 Webster as having a park to the right of the building and a basketball area. There were benches in front of the building, a sidewalk and then a curb.

Upon her arrival, Respondent Guzman did not see anyone committing crimes, acting disorderly, shooting firearms or shooting off fireworks. When she got out of the car, she saw Staple and Karnow standing on the side of the building. The officers were not taking any enforcement action or talking to anyone. Respondent Guzman walked up to them and talked to them for a few minutes about which buildings they were going to

cover. After the conversation, a little boy and his family came. Respondent Guzman wound up tossing the football back and forth with the little boy. She could not recall how she got the ball. The child may have dropped the football which then rolled to her. Respondent Guzman thought the boy looked happy when she tossed it back to him. The boy's family members were smiling while the child was passing the football to the officers.

Staple stood next to the little boy and Karnow was adjacent to him. Respondent Diaz was adjacent to Respondent Guzman. Respondent Guzman stated that she could see the three buildings of her post from where she was standing. She first saw McNamara as he was coming up the walkway. Respondent Guzman put on her hat, executed a formal salute and waited for McNamara to address them. She explained that she had taken off her hat because it was hot, but she put it back on to show respect to McNamara.

Respondent Guzman stated that after she saluted McNamara, he put his hands up and said, "What are you doing? Don't you realize you're on overtime? What are you doing?" She recalled that McNamara was yelling and was loud enough for other people to hear. At this time, the little boy started walking back to his family.

According to Respondent Guzman, McNamara turned toward Staple and Karnow, wrote all of the officers' names down in his pad, and told Staple and Karnow to come see him at the end of the night and that they "better come in big." Respondent Guzman interpreted "come in big" as a reference to activity, such as summons, arrests and Stop and Frisk Reports. Although McNamara's stance made it seem like he was talking to Staple and Karnow, she inferred that he was speaking to all four officers.

Respondent Guzman agreed that it seemed McNamara was only concerned with

“coming in big” because he never addressed or specifically mentioned the football being tossed at the scene. She found out about the misconduct allegation pursuant to the football when she came back from her days off and Staple informed her that they were receiving CDs.

Respondent Guzman was questioned at an official Department interview in March 2011. She could not recall being asked any questions regarding whether she had “come in with activity” on July 4, 2010. She spoke with her union representative, Officer Harry Thompson, about McNamara’s confrontation of the officers on July 4, 2010. Thompson told her, “Don’t worry, that’s just Mac [McNamara].”

Respondent Guzman believed that she was sufficiently policing her post because she stood in front of her assigned post and remained alert. She claimed that she and Respondent Diaz were looking out for unauthorized barbecues and were making sure there was no loud music playing anywhere. She asserted that she was remaining vigilant and was “making sure that nobody was coming up to us in a secretive manner.” She maintained that she did not see anyone drunk, acting disorderly, dealing drugs, breaking into cars, committing robberies, or shooting anyone.

Respondent Guzman, who has served as an officer for 18 years, stated that she understood the concept of omnipresence. She agreed that officers cannot be everywhere at once. She believed that the conditions the Department was concerned about at the Houses were being addressed because she was present at her post.

On cross examination, Respondent Guzman affirmed that the conditions that needed to be addressed in the Houses included shootings, stabbings and robberies. She believed that her responsibilities on July 4th were to address any conditions that might



require police attention. She conceded that she and Staple threw the football with the child as well as with each other for about five to ten minutes. She claimed that while she was tossing the football, she was still able to perform her duties and responsibilities under the Violence Reduction Initiative. She testified that if she had observed a condition or received a radio transmission requiring a police response, she would have been able to address it. She further maintained that she would have been able to address any issues if they were to arise in other areas of the housing development. Respondent Diaz was watching the area while Respondent Guzman was tossing the football.

Respondent Guzman stated that she and Respondent Diaz were responsible for three or four buildings on July 4, 2010. Respondent Guzman claimed that tossing the football for a few minutes did not affect her ability to effectively patrol these buildings. She reasoned that she would have been able to address any arising issues if they had gotten a 911 call or if a witness or victim had asked for help.

Respondent Guzman recalled that she arrived at the Houses at 8:30 p.m. and she performed her first vertical patrol at approximately 9:20 p.m. The interaction with McNamara occurred at 9:00 p.m. Respondent Guzman stated that she had a level of concern after McNamara addressed Respondents because he was upset. Although Respondent Guzman did not know why McNamara was angry at the time, she felt something "may come out of this." She affirmed that her supervisor never instructed her to throw a football to any children.

Respondent Guzman testified that Respondents conversed with Karnow and Staple and interacted with the little boy before they performed their first vertical patrol. She asserted that she and Respondent Diaz had tried to perform a vertical patrol, but they

were unable to do so because they could not notify Central about their intention to conduct a vertical patrol because "the radio was busy." She explained that they did not want to enter the building until the radio was clear and Central was aware that they were entering into the building. They were in front of the building when they first attempted to perform a vertical, but they were unable to get through to Central until 9:20 p.m.

Respondent Guzman believed it was appropriate conduct to toss the football with the child for five to ten minutes. She felt that she was having a positive interaction with the boy. She conceded that it was possible to have a positive community interaction in a shorter time period than five to ten minutes.

On redirect examination, Respondent Guzman stated that she did not time exactly how long she was tossing the football with the boy. She agreed that when she was in front of 1260 Webster, it was not possible for her to see what was happening on the other side of the building.

She asserted that she was permitted to stand in one place for a limited period of time while performing foot patrol because there is no requirement that officers constantly be on the move around their posts or that they conduct vertical patrols inside buildings within a specific time interval. She affirmed that there is a requirement to notify Central before going into a building to perform a vertical patrol. She explained that this call-in requirement was a safety measure so that Central would be aware of the building the officers were inside of. She was trained to wait for the radio to be clear before performing a vertical patrol and she asserted that she and Respondent Diaz had conducted a vertical patrol once the radio was clear and they had made the required notification.

FINDINGS AND ANALYSIS

Respondent Diaz and Respondent Guzman are each charged with failing and neglecting to remain alert while on duty on Sunday, July 4, 2010.

Most of the facts in this matter are not in dispute. It is not disputed that on Sunday, July 4, 2010, Respondent Diaz and Respondent Guzman were in uniform, assigned to PSA 7, paired together performing Impact Overtime that they had not volunteered for, pursuant to the Housing Bureau's Violence Reduction Initiative, at the Butler-Webster Houses (the Houses) along with other officers including Officers Gregory Karnow and Daniel Staple. Neither it is disputed that because it was the Independence Day holiday, many residents of the Houses were involved in outdoor activities on the grounds of the Houses and that although operating barbeques on the grounds is not normally permitted, enforcement of this rule is somewhat relaxed on the July 4 holiday and residents are permitted to operate barbeques on the grounds. Also, it is not disputed that it is important for officers who are assigned to patrol duties within the Housing Bureau to attempt to interact with residents while on patrol so that residents will report criminal activity and be willing to assist the Department.

The Department's contention that Respondent Diaz and Respondent Guzman did not remain alert while they were on duty rested solely on the testimony of Deputy Chief James McNamara, who held the rank of Inspector on July 4, 2010.

McNamara's testimony regarding his observations of the four officers on July 4, 2010, focused on the actions of Karnow and Staple who McNamara observed in front of 1260 Webster Avenue playing a football game in which one was trying throw a pass while the other tried to block the pass. McNamara testified that during the five to six

minute period that he was seated inside an unmarked car parked across the street from the Houses, he saw Respondent Diaz and Respondent Guzman standing with members of the community near Karnow and Staple but he did not claim that he had seen either Respondent Diaz or Respondent Guzman playing with a football.

Nonetheless, McNamara not only issued CDs to Karnow and Staple, he also issued CDs to Respondent Diaz and Respondent Guzman, and McNamara corroborated Respondents' testimony that he had charged them with improper patrol as well as failing to remain alert on duty.

The instant charges that Respondents failed to remain alert on duty must be examined in light of the history of the improper patrol charges which were dropped from the Charges & Specifications that were served on Respondents.

McNamara testified that he had charged Respondents with improper patrol because, although he did not personally observe any condition that needed to be addressed and although he did not review Respondents' Activity Logs to ascertain if they had addressed a condition before he arrived, he became "upset" when he saw that four officers were standing in the same area. He asserted that Respondents "were assigned to Butler and Webster Houses," a five block area containing 11 buildings, and that "if you have a post that's five blocks long" you are not properly covering that post if "you stand in one corner." However, Respondents contended that they were present on their patrol post because they were in front of 1260 Webster Avenue, a building which had been assigned to them when the 11 buildings in the complex were divided up that night for patrol purposes. McNamara conceded that since supervisors "sometimes carve it (the Houses) up" into patrol sectors, Respondents' supervisors "may have split" the buildings

up for patrol purposes that night. McNamara admitted that he did not attempt to ascertain whether the 11 buildings had been “split” up for patrol purposes, or whether 1260 Webster Avenue had been assigned to Respondents, before he issued CDs charging Respondents with improper patrol. These improper patrol charges were dropped when the CDs that were issued to Respondents were converted into the instant Charges & Specifications.


As to the remaining charges of failing to remain alert while on duty, contrary to the allegation in the charge against Respondent Guzman that she was “observed by Chief James McNamara throwing and catching a football with *three* (emphasis added) uniformed Members of Service,” McNamara did not testify that he ever saw Respondent Guzman or Respondent Diaz holding a football, much less “throwing and catching a football.” McNamara testified that he saw only two officers, Karnow and Staple, either throwing or trying to block a football.


McNamara testified that he had charged Respondents with failing to remain alert only because they were unaware that for the relatively brief period of “five to six minutes” he had been seated inside an unmarked car parked off the grounds of the Houses. However, he acknowledged that even before he arrived at 1260 Webster Avenue, he was upset with Respondents. McNamara acknowledged that he felt that Respondent Diaz and Respondent Guzman had demonstrated a lack of urgency in getting to the Houses that night because they left the command after Karnow and Staple had left. McNamara admitted that he considered their explanation that they were awaiting transportation to the Houses to be merely a lame excuse because he believed that there were “a lot of cars” available to transport them to the Houses.

Also, although McNamara testified that when he arrived at the Houses he was upset that Respondents were not performing vertical patrols inside buildings, the Department did not dispute Respondent Diaz' testimony that she and Respondent Guzman were not permitted to enter a building to perform a vertical patrol until after they had notified Central via radio as to what building they were entering, and the Department offered no evidence to refute Respondent Diaz' testimony that during the period between their arrival at the Houses and McNamara's approach, they had initiated radio transmissions to Central that they were about to enter a building but they had not been able to get through to Central due to heavy radio traffic.

I credit Respondent Diaz' testimony that she was alert to the conditions around them because McNamara did not dispute Respondent Diaz' testimony that she did not join the other officers in tossing around the football, and I credit Respondent Guzman's testimony because, even though McNamara did not claim that he had seen her throwing a football, she candidly volunteered that she had joined Karnow and Staple in briefly tossing a football around with a young boy.

Based on the entire record, I find that the Department failed to meet its burden of proof and I recommend that Respondents be found Not Guilty.

**APPROVED**  
DEC 17 2012  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER

Respectfully submitted,  
  
Robert W. Vinal  
Assistant Deputy Commissioner – Trials